

This Opinion is not a
Precedent of the TTAB

Mailed: March 8, 2023

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board

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In re Help Refugees Limited

—
Serial No. 87476700

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Leonard Ellis Seidman and Frederick Pinto of Pinto Legal, for Help Refugees Limited.

Laura G. Kovalsky, Trademark Examining Attorney, Law Office 110,
Chris Pedersen, Managing Attorney.

—
Before Zervas, Wolfson and Goodman,
Administrative Trademark Judges.

Opinion by Zervas, Administrative Trademark Judge:

Help Refugees Limited (“Applicant”) seeks registration on the Principal Register of the proposed standard character mark CHOOSE LOVE for the following goods and services:¹

Carrying cases, sleeves, containers and protective coverings for hand held electronic devices, personal digital assistants, mobile telephones, MP3 players, and laptops;

¹ Application Serial No. 87476700, filed on June 6, 2017 under Sections 1(b) and 44(e) of the Trademark Act, 15 U.S.C. §§ 1051(b) and 1126(e), for each International Class.

Unfitted leather neck straps for carrying mobile telephones and MP3 players (in International Class 9);

Leather and imitation leather; handbags; travel cases; luggage; holdalls; backpacks; school bags; beach bags; travelling bags; suitcases; trunks; haversacks; all-purpose carrying bags for use by campers; furs and fur-skins sold in bulk; collars for animals; covers for animals; boxes of leather or leather board; attaché cases; wallets; school satchels and briefcases; key cases; briefcases; canes; business card cases; leather shoulder bags; parasols; purses; drawstring pouches; rucksacks; sling bags; reusable shopping bags; tote bags; travelling trunks; valises; vanity cases, not fitted; umbrellas; umbrella covers; walking sticks; walking stick handles; walking stick seats; whips, harnesses and saddlery; toiletry bags sold empty; bum bags; sports bags; casual bags in the nature of weekend bags; music cases; satchels; carriers for suits, for shirts and for dresses; tie cases; credit card cases and holders; leather shoulder belts; leather carrying cases; envelopes of leather for packaging; bands of leather; clothing for pets; leather leads; leather leashes; furniture coverings of leather; hat boxes of leather; luggage; wallets and other carriers, namely, identification card holders, travel card holders, ladies' wallets, ladies' purses, coin purses; pelts and animal hides; clothing for pets (in International Class 18);

Clothing, namely, shirts, pants, trousers, jackets, jumpers, sweaters, hoodies, hooded jackets, gilets, tee shirts, pajamas, jogging bottoms, sportswear, namely, sports pants, yoga pants, sports headbands, sweatbands, jogging bottoms; Sports leggings, sports shorts, sports skirts, sports skorts, sports shirts, sports tanks, sports jerseys, sports bras, sports jackets, sports vests, thermal vests, sports socks, tank tops, blouses, underwear, dresses, skirts, socks, leggings, loungewear; Footwear; Headwear, namely, hats, beanies, baseball caps, caps, brimmed hats, fedoras, headbands, hoods; leather belts (in International Class 25);

Organizing and conducting charity auctions for charitable fundraising purposes (in International Class 35); and

Charitable fundraising services by means of selling goods to raise funds; Charitable fundraising services by means of

on-line and in-person crowdfunding in the nature of providing financing from money collected from individuals; Charitable fundraising services by means of providing individuals with the information and opportunity to make monetary donations for charities and charitable causes that are working to alleviate the suffering of and challenges faced by displaced people, including IDPs, refugees and migrants, for research into human health and well-being for the provision of medical support for patients suffering from injuries, and short and long-term illnesses; Charitable fundraising using direct marketing and advertising, namely, through print, online and radio advertisements, and through music and videos; Charitable fundraising services by means of collecting and reselling used automobiles; Charitable fundraising services by means of collecting and redeeming recyclables, including clothes, for donation of redemption proceeds to charitable organizations; Charitable fundraising by means of organizing and conducting special events for charities and charitable causes that are working to alleviate the suffering of and challenges faced by displaced people, including IDPs, refugees and migrants, for research into human health and well-being for the provision of medical support for patients suffering from injuries, and short and long-term illnesses; Charitable fundraising services by means of partnerships with on-line and social media influencers for charities and charitable causes that are working to alleviate the suffering of and challenges faced by displaced people, including IDPs, refugees and migrants, for research into human health and well-being for the provision of medical support for patients suffering from injuries, and short and long-term illnesses; Charitable fundraising services by means of partnerships with brands and corporations for charities and charitable causes that are working to alleviate the suffering of and challenges faced by displaced people, including IDPs, refugees and migrants, for research into human health and well-being for the provision of medical support for patients suffering from injuries, and short and long-term illnesses; Accepting and administering monetary charitable contributions for charities and charitable causes that are working to alleviate the suffering of and challenges faced by displaced people, including IDPs, refugees and migrants, for research into human health and well-being

for the provision of medical support for patients suffering from injuries, and short and long-term illnesses; Financial grant services in the nature of providing financial project grants for environmental and health awareness projects; Charitable foundation services, namely, providing funding and financial assistance for charities and charitable causes that are working to alleviate the suffering of and challenges faced by displaced people, including IDPs, refugees and migrants, for research into human health and well-being for the provision of medical support for patients suffering from injuries, and short and long-term illnesses; Provision of financial information; Financial services, namely, administration of transactions involving funds drawn from securities, stocks, funds, equities, bonds, cash, or other types of financial investments in retirement plans using a check or negotiable order of withdrawal over a global data network; Consultancy, information and advisory services relating to all of the aforesaid services (in International Class 36).

Citing Trademark Act Sections 1, 2, 3, and 45, 15 U.S.C. §§ 1051-1053, 1127, the Examining Attorney refused registration because the applied-for mark is a slogan or term that does not function as a trademark or service mark to indicate the source of Applicant's goods and services and to identify and distinguish them from others. The Examining Attorney contends that the evidence shows that CHOOSE LOVE fails to function as a mark because "it is a commonplace term, message or expression widely used by a variety of sources to convey a familiar sentiment."²

² 11 TTABVUE 1.

Citations to the briefs are to TTABVUE, the Board's online docketing system. Specifically, the number preceding "TTABVUE" corresponds to the docket entry number, and any number(s) following "TTABVUE" refer to the page number(s) of the docket entry where the cited materials appear. Page references to the application record are to the downloadable .pdf version of the United States Patent and Trademark Office's Trademark Status & Document Retrieval (TSDR) system. See *Turdin v. Trilobite, Ltd.*, 109 USPQ2d 1473, 1476 n.6 (TTAB 2014).

After the Examining Attorney issued her second final Office Action on September 15, 2021, Applicant appealed to this Board and requested reconsideration. The Examining Attorney denied the request for reconsideration. The Board resumed the appeal, and Applicant and the Examining Attorney each filed a brief. We affirm the refusal to register the proposed mark for the goods and services in each International Class.

I. Evidentiary Issues

1. Applicant referred to the following registrations in its August 16, 2021 Response to support its arguments that CHOOSE LOVE is registrable:

- Registration No. 4527746 for CHOOSE LOVE in standard character form for “Clothing, namely, leggings, shorts, tank tops, sport bras, sweatshirts, t-shirts, dresses, jackets, bathing suits, lingerie, pants, hooded sweatshirts, jackets, wraps, beanies, gloves, scarves, tops, vests, jump suits, leotards, head scarves, hats, flip flops, and shoes” in International Class 25.
- Registration No. 5156262 for CHOOSE LOVE for cosmetics and make-up in Class 3;
- Registration No. 5282011 for CHOOSE LOVE for “instructional, educational, and reading materials in the field of social and emotional learning; printed instructional, educational and reading materials; charitable foundation services in Class 9, 16 and 35; and
- Registration No. 6084310 for CHOOSE LOVE [and design] for gift boxes, featuring spices, spice blends, seasonings, processed herbs in Class 30.

Applicant did not provide actual copies of the registrations. The Examining Attorney had submitted a printout of the registration record for Registration No. 4527746 in support of a now-withdrawn refusal to register the applied-for mark

under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d) based on likelihood of confusion with the mark in Registration No. 4527746. The application was suspended after Applicant noted in its May 21, 2020 Response that the owner of Registration No. 4527746 had failed to submit a timely declaration under Section 8 of the Trademark Act, 15 U.S.C. § 1058.³ When the suspension was lifted, the refusal was not repeated and is deemed withdrawn.⁴ We have given Registration No. 4527746 little consideration because expired or cancelled registrations generally are evidence only of the fact that the registrations issued. *In re Brown-Forman Corp.*, 81 USPQ2d 1284, 1286 n.3 (TTAB 2006).

With regard to Registration Nos. 5156262, 5282011 and 6084310, the Examining Attorney did not object to Applicant's reference to the registrations in its Response, and did not instruct Applicant on how to make the registrations of record. TRADEMARK TRIAL AND APPEAL BOARD MANUAL OF PROCEDURE (TBMP) § 1207.03 (2022) provides:

If the applicant, during the prosecution of the application, provided a listing of third-party registrations, without also submitting actual copies of the registrations, and the examining attorney did not object or otherwise advise the applicant that a listing is insufficient to make such registrations of record at a point when the applicant could cure the insufficiency, the examining attorney will be deemed to have waived any objection as to the admissibility of the list.

See also In re City of Houston, 101 USPQ2d 1534, 1536 (TTAB 2012) (“[T]he examining attorney's failure to advise applicant of the insufficiency of the list of

³ 9 TTABVUE 12.

⁴ The better practice would have been for the refusal to have been expressly withdrawn in the following Office Action.

registrations when it was proffered during examination constituted a waiver of any objection to consideration of that list. Accordingly, we will consider the ... list of registrations ... ‘for whatever limited probative value such evidence may have,’” (citing *In re Broyhill Furniture Indus. Inc.*, 60 USPQ2d 1511, 1513 n.3 (TTAB 2001), *aff’d*, 731 F.3d 1326, 108 USPQ2d 1226 (Fed. Cir. 2013)). Because the Examining Attorney did not object to Registration Nos. 5156262, 5282011 and 6084310, we have considered these three registrations but only for the information provided by Applicant in its Response, which is the information identified above.

2. Applicant references in its brief five active registrations (including Registration Nos. 5156262, 5282011 and 6084310), five cancelled registrations (including Registration No. 4527746) and five abandoned applications containing the term CHOOSE LOVE alone or in combination with other terms.⁵ TBMP § 1207.03 states,

Evidence submitted after appeal, without a granted request to suspend and remand for additional evidence ... may be considered by the Board, despite its untimeliness, if the nonoffering party (1) does not object to the new evidence, and (2) discusses the new evidence or otherwise affirmatively treats it as being of record.

Because the Examining Attorney did not object to the evidence and has discussed these registrations and applications in her brief,⁶ we consider them, but only to the extent of the information included by Applicant. Because no information is provided as to the goods or services listed in the applications and registrations, and because abandoned applications are evidence only that the applications were filed, *see*

⁵ 9 TTABVUE 12-14.

⁶ 11 TTABVUE 7.

Interpayment Services Ltd. v. Docters & Thiede, 66 USPQ2d 1463, 1468 n.6 (TTAB 2003), the registrations and applications have very little probative value.⁷

3. Applicant submitted screenshots embedded in its brief without indicating their source. *See* TTABVUE 8-9. We will not search through the record to determine if the screenshots appear elsewhere in the record. Because the Examining Attorney discussed the screenshots in her brief, however, we have considered the screenshots to be in the record. *See* TBMP ¶ 1207.03.

4. We have not considered the hyperlinks in Applicant's brief.⁸ Listing the URL does not make the webpage of record. The Board has expressly stated that "[p]roviding only the link without the material attached is not sufficient to introduce it into the record." TBMP § 1208.03 (June 2022); *see also In re Fantasia Distrib., Inc.*, 120 USPQ2d 1137, 1143, n.13 (TTAB 2016), citing *In re Planalytics*, 70 USPQ2d 1453, 1458 (TTAB 2004) (providing a link to a website does not suffice to put information in the record because of the transitory nature of the information available through the link); *In re HSB Solomon Assoc. LLC*, 102 USPQ2d 1269, 1274 (TTAB 2012) ("[T]he evanescent nature of web content makes it particularly important that a copy of the relevant material be submitted in the record").

Also, Trademark Rule 2.142(d), 37 C.F.R. § 2.142(d), provides that "[t]he record in an application should be complete prior to the filing of an appeal" and "[e]vidence

⁷ Applicant provided information about the goods and services in its Response regarding Registration Nos. 4527746, 5156262, 5282011 and 6084310, as well as argument regarding Reg. No. 4527746, all of which we have considered.

⁸ 9 TTABVUE 9-10.

should not be filed with the Board after the filing of a notice of appeal.” “The evidence submitted with Applicant’s appeal brief that Applicant did not previously submit during prosecution . . . is untimely and will not be considered.” *In re Inn at St. John’s, LLC*, 126 USPQ2d 1742, 1744 (TTAB 2018), *aff’d*, 777 Fed. Appx. 516 (Fed. Cir. 2019).

II. Evidence and Arguments

A. Evidence submitted by the Examining Attorney

1. February 16, 2021 Office Action

- “Choose love” on T-Shirts, sweat shirts, hats, tank tops, hoodies, face masks, bracelets, shopping bags, cups, wall signs, decorative stones, rings, necklaces, phone cases and tote bags, on amazon.com.⁹

- “Choose love” on phone cases and tote bags, on zazzle.com.¹⁰

2. September 15, 2021 Office Action

- collagecenter.com (fundraising)

“And this year we ask you to join us in choosing love. ... We’ll share real-life stories that convey our call to choose love.”¹¹

⁹ TSDR 4-10, 24-33.

¹⁰ TSDR 19-23.

¹¹ TSDR 23.

- crateandbarrel.com

“Choose Love: Take a Look Inside Our Private Registry Event with Vow to End Child Marriage.”



- beloveapparel.com

“I Choose Love” on clothing items.¹³

- christianbook.com

“Choose Love” on tote bag.¹⁴

- myhoovesandpaws.com

“Choose love” on hat - “Choose Love Hat Black.”¹⁵

- ichooselovepds.com

“I Choose Love” on T-shirts and hoodies, tank top, face mask, bottle, sticker and cinch pack.¹⁶

¹² TSDR 25-26.

¹³ TSDR 44-46.

¹⁴ TSDR 47-50.

¹⁵ TSDR 51.

¹⁶ TSDR 55-57.

- simplyamazingliving.com

“Choose love” on T-shirt, with text stating “RED is selling a ‘Choose Love’ t-shirt [as] a spin on the ‘Choose Life’ slogan for \$30 (US).”¹⁷

- Comment by Terra Heck – December 21, 2017

“I love the concept of this campaign. I think we’d be a much better place i[f] more of us would CHOOSE LOVE.”¹⁸

- Comment by Sally – December 16, 2017

“CHOOSE LOVE is a beautiful message.”¹⁹

- Comment by Reesa L. – December 15, 2017

“Love the ‘Choose Love’ campaign as well as what it stands for.”²⁰

- Comment by Alicia Taylor – December 13, 2017

“I do love the message of the choose [l]ove shirts.”²¹

- theshopwithpurpose.com

“Choose love” on T-shirt.²²

- woolfwithme.com

“Choose love” on hat.²³

¹⁷ TSDR 60-61.

¹⁸ TSDR 64.

¹⁹ *Id.*

²⁰ TSDR 66.

²¹ TSDR 67.

²² TSDR 75.

²³ TSDR 78-79.

• Excerpts from 100 articles obtained from the Lexis/Nexis database, the following as representative samples (with highlighted text in the original):

[Letters to the editor: When it comes to wearing masks for COVID, what would Jesus do?](#)

The Kansas City Star | Sep 05, 2021 | letters_to_the_editor | 930 | The Kansas City Star
... heartening to see a faith-based school community follow the **command to choose love first**. I pray that others will follow. - Rev. Donna J. ...

[Wheeler's new communications director quits after 1 week](#)

The Oregonian | Sep 05, 2021 | A; Pg. 004 | 300 | Shane Dixon Kavanaugh - The Oregonian/OregonLive
... on Wiseley's first day, gloating about the success of his **"choose love" event** ahead of the melee and claiming that, as a ...

[Unvaccinated dad shares 'deathbed plea' before dying of COVID, Nebraska family says](#)

The Kansas City Star | Aug 31, 2021 | coronavirus | 593 | Kaitlyn AlanisThe Kansas City Star
... made a different choice. You have the right to choose. Please **choose love** of family, love of friends and love of community." Before the ...

[Johnny Cash's children choose love: They call out neo-Nazi with Cash name on T-shirt](#)

The Kansas City Star | Aug 17, 2017 | stargazing | 303 | Lisa GutierrezThe Kansas City Star
... of us, over and over throughout our lives, 'Children, **you can choose love or hate. I choose love**.' "To any who claim supremacy over other human beings, to ...
... stargazing Johnny Cash's children **choose love** : They call out neo-Nazi with Cash name on T-shirt Lisa ...

[Can a sweet-but-lackluster love be more than 'meh'?](#)

The Buffalo News (New York) | Aug 22, 2021 | F,F; Pg. 65 | 471
... a long time and hit a snag. If you have to **choose love** at the onset of a relationship, it's not the right person. ...

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- google.com/search

“choose love” on phone cases.²⁵

- cafepress.com

“choose love” on phone cases.²⁶

- bongjovannisloan.com – “Welcome to BSP Insurance”

“Choose Love Fundraiser.”²⁷

3. April 20, 2022 Office Action

- chooselove.gives

Soliciting donations for “making a difference in the Tenino Community.”²⁸

- fineartamerica.com

“Choose Love” tote bag.²⁹

- redbubble.com

“Choose Love” T-shirts, stickers, pouches, laptop sleeves and tote bags.³⁰

- society6.com

“Choose Love” cell phone cases.³¹

²⁵ TTABVUE 81-84.

²⁶ TSDR 88.

²⁷ TSDR 89.

²⁸ TSDR 11-14.

²⁹ TSDR 15.

³⁰ TSDR 31-40.

³¹ TSDR 41-46.

- teddythedog.com

“Choose Love” dog T-shirt, dog collar, T-shirt and car magnet.³²

- teepublic.com

“Choose Love” laptop case.³³

- theloveapparelnyc.com

“Choose Love” tote bag.³⁴

- jeannieshaw.com

“Choose Love” fanny pack.³⁵

Other uses:

- chooseloverevolution.com (fundraising)

“Join the Choose Love Dance Club.”³⁶

- chooselovemovement.org (fundraising, advocacy, education)

“The Jesse Lewis Choose Love Movement™ and Choose Love Enrichment Program.”³⁷

- chooselovefoundation.com

“Volunteer nonprofit organization serving the homeless community” named “Choose Love Foundation.”³⁸

³² TSDR 47-58.

³³ TSDR 59-62.

³⁴ TSDR 63-65.

³⁵ TSDR 17-18.

³⁶ September 15, 2021 Office Action, TSDR 7-13.

³⁷ *Id.*, TSDR 14-21.

³⁸ April 20, 2022 Office Action, TSDR 5-7.

- Letschooselove.org

“Let’s Choose Love Mini Grant Application”

Assistance with grant applications, stating, “You will work with a consultant from Let’s Choose Love who will help guide your success.”³⁹

B. Evidence submitted by Applicant

- Registration Nos. 4527746, 5156262, 5282011 and 6084310, discussed above;

- Pages from Applicant’s website, including the following passages:⁴⁰

Choose Love. It’s a simple, but powerful message.

At a time when the world faces many challenges; when rhetoric of hate and division has found itself centre stage; we believe sharing this simple message has never been more vital.

We all have a choice. To be motivated by fear and animosity, to build walls and turn our backs on the world. Or to nurture the hopeful; to recognise our common future. To choose love. The world can feel broken, but everywhere these cracks are letting in light.

We’re under no illusions. We know we face some huge challenges. But if there’s one thing we’ve learned as charity, and as a community, it’s that we can all play a part in creating the world we want to see. And choosing love seems like a pretty good place to start.

- foreign registrations for CHOOSE LOVE.⁴¹

III. Analysis

“The Trade-Mark Act is not an act to register words but to register trademarks. Before there can be registrability, there must be a trademark (or a service mark) and, unless words have been so used, they cannot qualify for registration.” *In re Standard*

³⁹ *Id.*, TSDR 23-25.

⁴⁰ March 7, 2018 Resp., TSDR 17-26.

⁴¹ *Id.*, TSDR 27-42; October 2, 2018 Resp., TSDR 17-26. These registrations have no probative value on the issue before us because they are foreign.

Oil Co., 275 F.2d 945, 125 USPQ 227, 229 (CCPA 1960). Thus, we consider the Act’s definition of a trademark, which is “any word, name, symbol, or device, or any combination thereof ... [used] to identify and distinguish his or her goods, including a unique product, from those manufactured or sold by others and to indicate the source of the goods, even if that source is unknown.” Trademark Act § 45, 15 U.S.C. § 1127. We also consider the Act’s definition of a service mark, which is “any word, name, symbol, or device, or any combination thereof ... [used] to identify and distinguish the services of one person ... from the services of others and to indicate the source of the services, even if that source is unknown.” *Id.* See also *In re Bose Corp.*, 546 F.2d 893, 192 USPQ 213, 216 (CCPA 1976) (“the classic function of a trademark is to point out distinctively the origin of the goods to which it is attached”).

Whether the phrase CHOOSE LOVE falls within these definitions and functions as a mark depends on consumer perception. See *In re Vox Populi Registry Ltd.*, 25 F.4th 1348, 2022 USPQ2d 115, at *5 (Fed. Cir. 2022) (“In analyzing whether a proposed mark functions as a source identifier, the Board focuses on consumer perception. In evaluating consumer perception, ‘we look to [any] ... evidence of record showing how the designation is actually used in the marketplace’[.]” (citations omitted)). The court noted that “widespread use of a term or phrase may be enough to render it incapable of functioning as a trademark, regardless of the type of message.” *Id.*, at *7.

“Where the evidence suggests that the ordinary consumer would take the words at their ordinary meaning rather than read into them some special meaning

distinguishing the goods and services from similar goods and services of others, then the words fail to function as a mark.” *In re Ocean Tech., Inc.*, 2019 USPQ2d 450686, at *3 (TTAB 2019) (internal punctuation omitted). When “there are no limitations on the channels of trade or classes of consumers of the [goods and services] identified in the application, the relevant consuming public comprises all potential purchasers of ... [such goods and services].” *In re Team Jesus, LLC*, 2020 USPQ2d 11489, at *3 (TTAB 2020). Here, because there are no limitations in the goods and services listed in the subject application, we find that consumers of such goods and services, including the ultimate consumers of the charitable services, are members of the general public.

“[W]idespread use of a term or phrase may be enough to render it incapable of functioning as a trademark, regardless of the type of message.” *In re Tex. With Love*, 2020 USPQ2d 11290, at *7 (TTAB 2020). Expressions in ubiquitous use are unlikely to be perceived as source identifiers. *See D.C. One Wholesaler, Inc. v. Chien*, 120 USPQ2d 1710, 1716 (TTAB 2016) (I ♥ DC (stylized) for bags, clothing, plush toys); *In re AOP LLC*, 107 USPQ2d 1644, 1655 (TTAB 2013) (AOP for wine); *In re Eagle Crest*, 96 USPQ2d at 1229 (ONCE A MARINE, ALWAYS A MARINE for clothing); *In re Aerospace Optics, Inc.*, 78 USPQ2d 1861, 1864 (TTAB 2006) (SPECTRUM for illuminated pushbutton switches), *appeal dismissed*, 208 Fed. Appx. 824 (Fed. Cir. 2006); *In re Volvo Cars of N. Am. Inc.*, 46 USPQ2d 1455, 1460-61 (TTAB 1998) (DRIVE SAFELY for automobiles); *In re Manco Inc.*, 24 USPQ2d 1938, 1942 (TTAB 1992) (THINK GREEN and design for weather stripping and paper products); *In re*

Remington Prods., Inc., 3 USPQ2d 1714, 1715 (TTAB 1987) (PROUDLY MADE IN USA for electric shavers); *In re Tilcon Warren, Inc.*, 221 USPQ 86 (TTAB 1984) (WATCH THAT CHILD for construction material); *In re Schwauss*, 217 USPQ 361, 362 (TTAB 1983) (FRAGILE for labels and bumper stickers). “To make this determination we look to the ... evidence of record showing how the designation is actually used in the marketplace.” *In re Eagle Crest*, 96 USPQ2d at 1229 (citations omitted).

Applicant argues that the burden on the Examining Attorney to establish her refusal is “very high,” citing *In re Trek 2000*, 97 USPQ2d 1106 (TTAB 2010), a case involving genericness:

For an Examining Attorney to declare that a phrase cannot act as a source identifier, the evidence must be overwhelming in favor of such a determination. ... Therefore, a very high standard of proof is required for the Examining Attorney to establish that Applicant’s mark fails to function as a mark.⁴²

Applicant’s statement is incorrect. The USPTO need only establish a prima facie case to support the failure to function refusal of registration. *See In re Brunetti*, 2022 USPQ 764, *40 (TTAB 2022), (“The Examining Attorney is required to establish a reasonable predicate for his position – i.e., a prima facie case – that [the proposed mark] is not registrable[.]”). Even for genericness refusals, Section 1209.01(c)(i) of the TRADEMARK MANUAL OF EXAMINING PROCEDURE (TMEP) (2022) states, “[t]he examining attorney must establish a prima facie case that a term is generic by

⁴² 9 TTABVUE 10.

providing a reasonable predicate (or basis) that the relevant purchasing public would primarily use or understand the matter sought to be registered to refer to the genus of goods or services in question.” And the burden on an applicant to overcome a failure to function refusal is no different from (or greater than) the burden on an applicant faced with a generic or descriptiveness refusal or a refusal under Section 2(d) of the Trademark Act.⁴³

The evidence reveals that CHOOSE LOVE does **not** perform the desired trademark and service mark function and does **not** fall within the Act’s definition of a trademark or service mark. It would **not** be perceived as a mark, but rather as a widely used exhortation to “[s]pread a message of positivity and hope,” as Applicant refers to the term in its website.⁴⁴

One consumer characterized the phrase CHOOSE LOVE as a “beautiful message.”⁴⁵ Others have said:

- Terra Heck – December 21, 2017

I think we’d be a much better place i[f] more of us would
CHOOSE LOVE.⁴⁶

⁴³ The Federal Circuit has held that an examining attorney’s prima facie case for a refusal must be rebutted by “competent evidence,” which requires “proof by preponderant evidence.” *See, e.g., In re Becton, Dickinson & Co.*, 675 F.3d 1368, 102 USPQ2d 1372, 1376-77 (Fed. Cir. 2012).

⁴⁴ 9 TTABVUE 8.

⁴⁵ Comment by Sally – December 16, 2017 (“CHOOSE LOVE is a beautiful message”). September 15, 2021 Office Action, TSDR 64.

⁴⁶ *Id.*, TSDR 64.

- Reesa L. – December 15, 2017

Love the “Choose Love” campaign as well as what it stands for.⁴⁷

- Alicia Taylor – December 13, 2017

I do love the message of the choose [l]ove shirts.⁴⁸

The evidence embedded within Applicant’s brief reflects that Applicant uses the phrase on T-shirts and tote bags. Specifically, Applicant has screen-printed the term “CHOOSE LOVE” in large letters across the front of its T-shirts and tote bags, but not in other places on goods. “[T]he large letters on Applicant’s T-shirts [and tote bags] are a relevant consideration, indicating that consumers purchase the T-shirts [and tote bags] for the message emblazoned across the front.” *Univ. of Kentucky v. 40-0, LLC*, 2021 USPQ2d 253, *32 (TTAB 2021) (citing *In re Lululemon Athletica Can. Inc.*, 105 USPQ2d 1684, 1689 (TTAB 2013); *In re Mayweather Promotions, LLC*, 2020 USPQ2d 11298, at *4 (TTAB 2020) (“[T]his common message is used on t-shirts as a feature such that the display itself is an important component of the product and customers purchase the product not associating it with a particular source but because of the message.”) (internal punctuation omitted)).

In addition, news articles, such as the ones above, and others, use the term as “a message of positivity and hope.” *See, e.g.*,⁴⁹

⁴⁷ *Id.*, TSDR 66.

⁴⁸ *Id.*, TSDR 67.

⁴⁹ September 15, 2021 Office Action, TSDR 94, 97.

1. [Letters to the editor: When it comes to wearing masks for COVID, what would Jesus do?](#)

The Kansas City Star | Sep 05, 2021 | letters_to_the_editor | 930 | The Kansas City Star

... heartening to see a faith-based school community follow the **command to choose love first**. I pray that others will follow. - Rev. Donna J. ...

2. [Wheeler's new communications director quits after 1 week](#)

The Oregonian | Sep 05, 2021 | A; Pg. 004 | 300 | Shane Dixon Kavanaugh - The Oregonian/OregonLive

... on Wiseley's first day, gloating about the success of his **"choose love" event** ahead of the melee and claiming that, as a ...

4. [Johnny Cash's children choose love: They call out neo-Nazi with Cash name on T-shirt](#)

The Kansas City Star | Aug 17, 2017 | stargazing | 303 | Lisa GutierrezThe Kansas City Star

... of us, over and over throughout our lives, 'Children, **you can choose love or hate. I choose love**.' "To any who claim supremacy over other human beings, to ...

... stargazing Johnny Cash's children **choose love** : They call out neo-Nazi with Cash name on T-shirt Lisa ...

20. [4 years after MAX attack, a mother grieves and finds hope](#)

The Oregonian | May 27, 2021 | A; Pg. 002 | 394 | Kale Williams - The Oregonian/OregonLive

... with flowers and a box full of stickers that read, "We **choose love** ." "If you have to choose a way to die," she ...

... on steps next to a mural dedicated to the victims. "We **choose love** ," the same phrase that adorns the stickers, is emblazoned on ...

Further, the record demonstrates use of CHOOSE LOVE on a wide variety of goods and in connection with fundraising services. "Where purchasers buy goods and services based on the common message they display, that message fails to function as a trademark, even if it is displayed in a conventional trademark manner." *Univ. of Kentucky*, 2021 USPQ2d 253, *32.

Applicant argues that:

The ... evidence does not rise to the level of demonstrating that the use of "CHOOSE LOVE" is so common or

widespread that the consuming public would view it as a commonplace expression or sentiment. *See In re Eagle Crest, Inc.*, 96 USPQ2d 1227, 1229 (TTAB 2010). As a matter of fact, although the term “CHOOSE LOVE” has existed as a slogan for over a couple of decades, it can function and has successfully functioned as a mark, especially regarding the Applicant and its goods and services.⁵⁰

Applicant’s argument is not persuasive in view of the amount and quality of the Examining Attorney’s evidence, and because it is not supported by any analysis of the Examining Attorney’s evidence.

Turning to Registration Nos. 4527746, 5156262, 5282011 and 6084310 mentioned above,⁵¹ Applicant argues that they demonstrate that “consumers are used to seeing the phrase “CHOOSE LOVE” in the context of trademark use.”⁵² Applicant also argues:

While each case must be decided on its own facts and the Board is not bound by prior decisions involving different records, we are faced with a unique and extraordinary situation here. The Examining Attorney offered no reason for their inconsistent treatment of the Application prior to and after February 16th, 2021 [when the failure to function refusal was first raised by the Examining Attorney after approximately four years of prosecution of the involved application]. Furthermore, if so many marks can use the term “CHOOSE LOVE” for a variety of goods and services ranging from clothing and educational services, it is highly unlikely that the USPTO erred in every single one of the cases listed hereinabove, as none of the marks listed was refused based the on [sic] failure to function argument.

⁵⁰ 9 TTABVUE 11.

⁵¹ Other than Registration Nos. 4527746, 5156262, 5282011 and 6084310, the registrations and applications identified in Applicant’s brief have no probative value because they do not include the goods and services identified in the registrations and applications. *See* discussion *supra*.

⁵² 9 TTABVUE 12.

Therefore, if the USPTO did not err in allowing the marks listed for registration, surely the Applicant's Mark is also entitled to registration on the Principal Register.⁵³

First, third-party registrations are not evidence of commercial use of the marks shown therein, or what happens in the marketplace, or that consumers are familiar with the third-party marks. *See Olde Tyme Foods Inc., v. Roundy's Inc.*, 961 F.2d 200, 22 USPQ2d 1542, 1545 (Fed. Cir. 1992); *Spoons Rests. Inc. v. Morrison Inc.*, 23 USPQ2d 1735 (TTAB 1991), *aff'd unpub'd*, Appeal No. 92-1086 (Fed. Cir. June 5, 1992).

Second, third-party registrations alone do not reveal:

how the marks are used in connection with the registrants' goods and services; whether third parties use the same or similar marks, and, if so, how; whether the marks convey particular meanings or commercial impressions, and if so what those meanings or impressions are; or how extensively the marks are used by others, if at all.

In re Tex. With Love, 2020 USPQ2d 11290, at *21-22. Without "evidence that consumers regularly encounter these [third-party marks] used in the same way as the mark in question, namely, as an expression that is commonly used as such on a wide variety of goods," *Brunetti*, 2022 USPQ2d 764, at *36, Applicant's point regarding the registrations is meaningless. *See also In re Tex. With Love*, 2020 USPQ2d 11290, at *21-22 ("without that information, there is no support for Applicant's contention that the refusal of its application was rendered in a situation

⁵³ 9 TTABVUE 14.

that is ‘contextually identical’ to the circumstances leading to the allowance of these other registrations.”).

Third, as Applicant has pointed out, the USPTO’s registration of particular marks does not bind us here. *See In re Nett Designs, Inc.*, 236 F.3d 1339, 57 USPQ2d 1564, 1566 (Fed. Cir. 2001) (“Even if some prior registrations had some characteristics similar to Nett Designs’ application, the PTO’s allowance of such prior registrations does not bind the Board or this court.”); *Brunetti*, 2022 USPQ2d 764, at *6 (“[I]t is well settled that the USPTO must examine every application on the facts presented for compliance with statutory eligibility requirements, and every case is necessarily different.”); *In re USA Warriors Ice Hockey Program, Inc.*, 122 USPQ2d 1790, 1793 n.10 (TTAB 2017) (prior decisions and actions of other trademark examining attorneys in registering other marks have little evidentiary value and the Board is not bound by prior decisions involving different records). Each case must be decided on its own merits, and “[w]e do not believe that our decision here is inconsistent with the registration of the third-party marks cited by Applicant, but to the extent that it is, it is the decision required under the statute on the record before us.” *In re Ala. Tourism Dept.*, 2020 USPQ2d 10485, *11 (TTAB 2020).

Applicant also argues that:

[W]hen there is “a mixture of evidence” between the Office Action and the Applicant, that mixture of evidence would not rise to the required clear evidence showing that the phrase is incapable of trademark protection. *See In re Merrill Lynch, Pierce, Fenner, and Smith Inc.*, 4 USPQ2d 1141, 1143 (Fed. Cir. 1987). Further, any doubt regarding a failure to function should be resolved in the Applicant’s

favor. *See In re Waverley Inc.*, 27 USPQ2d 1620, 1623 (TTAB 1993).⁵⁴

The cases cited by Applicant involve marks that were refused registration as generic terms. Here, the issue is not genericness, and Applicant's mark is refused registration because the applied-for term fails to function as a trademark. Moreover, we have no doubts as to how to resolve the refusal to register before us.

In sum, we find that the evidence reveals that CHOOSE LOVE does not perform Applicant's desired trademark and service mark function, and does not fall within the Trademark Act's definition of a trademark and a service mark because it would not be perceived as a mark. Rather, it would be considered a commonplace term, message or expression widely used to convey an exhortation to "[s]pread a message of positivity and hope."⁵⁵ Applicant should not be able to deny potential competitors (who according to the record also use the phrase) the right to use CHOOSE LOVE freely. *In re Tex. With Love*, 2020 TTAB LEXIS 466, at *19.

IV. Conclusion

Because the evidence of record shows that CHOOSE LOVE is a widely used expression of a sentiment, it would not be perceived as an indicator of source in the context of Applicant's identified goods and services. We conclude that CHOOSE LOVE hence fails to function as a trademark under Sections 1, 2, 3 and 45 of the Trademark Act.

⁵⁴ 9 TTABVUE 10.

⁵⁵ 9 TTABVUE 8.

Decision: The refusal to register the phrase CHOOSE LOVE is affirmed for all International Classes of goods and services set forth in the application.